Gary

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Commerce Funding Corporation

File: B-236114

Date: October 2, 1989

DIGEST

The General Accounting Office will not question a contracting agency's determination that a small business concern is nonresponsible, or the agency's subsequent reassessment of new information regarding the concern's responsibility, where, following the agency's referral of the nonresponsibility determination to the Small Business Administration (SBA), the protester fails to apply to the SBA for a certificate of competency despite urging by the contracting agency that it do so.

DECISION

Commerce Funding Corporation (CFC), a small business, protests the award of a contract to any other bidder under invitation for bids (IFB) No. FCGE-89-B213-S, issued by the General Services Administration (GSA) as a Federal Supply Schedule procurement for microphotographic supplies. CFC objects that GSA's rejection of its low bid, on the ground that CFC was financially nonresponsible, was improper because the agency failed to make an "affirmative determination of nonresponsibility." In the alternative, the protester argues that, to the extent the agency did make a determination, it was arbitrary and capricious, and the agency effectively precluded the firm from appealing the determination by seeking a certificate of competency (COC) from the Small Business Administration (SBA).

We deny the protest.

GSA found CFC financially nonresponsible on the basis of financial information submitted by the firm in connection with a preaward survey. GSA based its determination on the grounds that the firm had inadequate working capital, debt equal to more than nine times the industry norm, a significant deficit in retained earnings, an operating loss for fiscal year 1988, and no established, available lines of

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credit with its banks. On May 24, 1989, the contracting officer found CFC nonresponsible and, since CFC is a small business concern, referred the matter to the SBA for possible issuance of a COC pursuant to the Small Business Act, 15 U.S.C. § 637(b)(7) (1988).

On June 5, the SBA requested CFC to provide information needed for review under the COC procedures by June 11; with the agreement of GSA, this deadline was later extended to June 13. CFC, however, chose instead to submit additional information to GSA, concerning a $1 million dollar letter of credit, in an effort to persuade the agency to make an affirmative determination of responsibility; GSA established a deadline of June 21 or 22 for submission to the agency of any further information concerning CFC's financial responsibility. On June 23, the SBA closed its file on the COC referral due to CFC's failure to file a COC application. On the same date, after evaluating the letter of credit submitted by CFC, GSA concluded that the letter did not constitute new information that provided a basis for reversing its nonresponsibility determination. CFC thereupon filed this protest with our Office.

CFC first asserts that GSA never made an "affirmative determination of nonresponsibility," since the contracting officer, in a May 24 memorandum entitled "Finding and Determination of Non-Responsibility," stated that, based on the cited findings concerning CFC's financial status, "further investigation of [CFC's] financial capabilities would be deemed appropriate." According to the protester, that statement constituted an admission by the agency that it lacked sufficient information for a finding of nonresponsibility, and therefore rendered invalid the referral to the SBA.

We disagree. By referring the matter to the SBA, the contracting officer indicated that he was unable to make the affirmative determination of responsibility--including the determination that the contractor possesses or can obtain the necessary financial resources--required by Federal Acquisition Regulation (FAR) § 9.104-1.

Furthermore, once a nonresponsibility determination has been made and, as required by 15 U.S.C. § 637(b)(7), the matter has been referred to the SBA for consideration of issuance of a COC, it is incumbent upon the small business to file and complete an acceptable COC application in order to avail itself of the protection provided by statute against unreasonable or bad faith determinations of responsibility.

Belmont-Schick Inc., B-225100, Nov. 14, 1986, 86-2 CPD ¶ 562. Where the firm fails to meet this responsibility, we will not question the contracting officer's negative responsibility determination; such a review would, in effect, amount to a substitution of our Office for the SBA, the agency specifically authorized by statute to review these determinations. Id. Since the contracting officer made a nonresponsibility determination, referred the matter to the SBA and advised CFC of his actions, CFC's failure to file and complete a COC application precludes review of the determination.

CFC argues that in agreeing to consider additional information from the firm, GSA misled the protester into thinking that it did not have to pursue its remedies with the SBA until after that agency's deadline had passed. On the contrary, however, the record indicates clear that GSA advised CFC on several occasions that there was no guarantee that GSA would reverse itself, and that the firm also should apply to the SBA for a COC.

CFC further argues that once having commenced a reexamination of CFC's financial responsibility after the May 24 nonresponsibility determination, GSA was required to conduct the review in a reasonable manner. According to the protester, the review was prematurely terminated and therefore unreasonable. See Marlow Services, Inc., B-229990.3, Apr. 19, 1989, 68 Comp. Gen. ____, 89-1 CPD ¶ 388; Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5.

Again, however, CFC did not file and complete an acceptable COC application. In these circumstances, where a small business concern does not avail itself of the protection afforded by statute against arbitrary nonresponsibility determinations, and thereby precludes possible further development of the record and input into the matter by SBA, we believe that even to review only the reassessment of the new information would be inconsistent with the statutory scheme.

In any case, it appears that GSA reasonably reassessed the new information concerning the $1 million dollar letter of credit, but found it insufficient to warrant reconsideration of the determination of nonresponsibility. In particular, the agency noted that financial statement for CFC, when read in conjunction with the statement for the Federal Funding Company (FFC), which issued the letter of credit, indicated that notes payable by CFC accounted for approximately 75 percent of FFC's assets, and that FFC's assets other than the notes payable by CFC were insufficient to cover the

letter of credit. Although CFC argues that GSA should have sought further clarification, the agency had already provided CFC with several opportunities to provide information concerning its responsibility, and the agency was not required to delay award indefinitely. See Cascade Leasing, Inc., B-231848.2, Jan. 10, 1989, 89-1 CPD ¶ 20.

The protest is denied.

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General Counsel